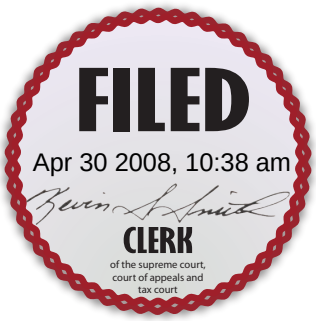

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IN THE
COURT OF APPEALS OF INDIANA

LEO DENT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-0708-CR-482
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0501-MR-00001

April 30, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Leo Dent ("Dent") was convicted in Lake Superior Court of murder and sentenced to sixty years in the Department of Correction. Dent argues that the trial court erred in refusing two tendered jury instructions. We affirm.

Facts and Procedural History

On January 4, 2005, Dent was drinking at the Blue Max Lounge with the owner, Larry Ross ("Ross"), and another patron. Michelle Taylor ("Taylor") was a waitress at the lounge who had a sporadic relationship with Dent. Taylor was serving drinks to Dent and the other patrons. During the evening, Dent did not exhibit any evidence of anger toward Taylor. Shortly before the shooting, John Sanders ("Sanders") entered the bar and sat at the bar opposite the area where Dent was seated.

A few moments later, Taylor returned to Dent's table with a drink order. At that moment, Dent stood up, yelled at Taylor and shot her in the head. Dent then ran to Sanders and grabbed him. Dent attempted to shoot Sanders in the head but his gun misfired. Dent fled the bar but was soon apprehended by police. Taylor died at the scene.

On January 5, 2005, Dent was charged with murder. On June 29, 2007, after a jury trial, Dent was convicted as charged. On July 20, 2007, Dent was sentenced to sixty years. Dent appeals.

Discussion and Decision

Dent argues that the trial court erred in refusing his two tendered final instructions on the lesser included offense of voluntary manslaughter. He argues that the testimony of Ross provided sufficient evidence to infer "sudden heat." Ross had testified that Dent's

behavior was unremarkable until Sanders entered the bar and then Dent "snapped." Tr. p. 354.

We use a three-step analysis to determine whether instructions on lesser-included offenses should be given. Wright v. State 658 N.E.2d 563, 566 (Ind. 1995). We must determine: (1) whether the lesser-included offense is inherently include in the crime charged; if not, (2) whether the lesser-included offense is factually included in the crime charged; and if either, (3) whether there is a serious evidentiary dispute where the jury could determine that the defendant committed the lesser offense but not the greater. Id. at 566-67. Reversible error occurs when the trial court did not give a requested instruction on the inherently or factually included lesser offense, if the jury could conclude that the lesser offense was committed and not the greater. Id. at 567.

The standard of review for this type of case is as follows:

> For convenience we will term a finding as to the existence or absence of a substantial evidentiary dispute, a Wright finding. Where such a finding is made we review the trial court's rejection of a tendered instruction for an abuse of discretion. This finding need be no more than a statement on the record that reflects that the trial court has considered the evidence and determined that no serious evidentiary dispute exists. Its purpose is to establish that the lack of a serious evidentiary dispute and not some other reason is the basis of the trial court's rejection of the tendered instruction. However, if the trial court rejects the tendered instruction on the basis of its view of the law, as opposed to its finding that there is no serious evidentiary dispute, appellate review of the ruling is de novo.

Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998) (citations omitted).

Voluntary manslaughter is inherently included in murder. O'Connor v. State, 399 N.E.2d 364, 368 (Ind. 1980). In this case, the trial court determined that the facts did not

support a serious evidentiary dispute regarding sudden heat, and we will review for an abuse of discretion. Brown v. State, 703 N.E. at 1019.

We disagree with Dent that a serious evidentiary dispute exists regarding sudden heat. Sudden heat is "anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary man; it prevents deliberation and premeditation, excludes malice, and renders a person incapable of cool reflection." McBroom v. State, 530 N.E.2d 725, 728 (Ind. 1988). To establish sudden heat, Dent must show "sufficient provocation to engender. . . passion." Clark v. State, 834 N.E.2d 153, 158 (Ind. Ct. App. 2005) (quoting Johnson v. State, 518 N.E.2d 1073, 1077 (Ind. 1988). "Any appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter." Id.

The only evidence that Dent proffers to support his allegation of sudden heat is the testimony of Ross regarding Dent "snapping." However, each eyewitness testified that no altercation or argument occurred between Taylor or Sanders. Additionally, the other testimony at trial showed that Dent was calm prior to the shooting of Taylor. Dent has failed to show any appreciable evidence of sudden heat.

The trial court properly determined that there was no evidentiary dispute regarding whether Dent acted in sudden heat. Therefore, we conclude that the trial court did not abuse its discretion by refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

Affirmed.

MAY, J., and VAIDIK, J., concur.